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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 138

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 1, 1964

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Regulation Involved	3
Statement of the Case	3
Reasons for Granting the Writ	9
I. The District Court Did Not Have Jurisdiction of the Subject-Matter	10
II. Respondent Had No Standing To Maintain the Action	11
III. If the Merits Are Reached, It is Important that This Court Settle the Question of Whether the Railway Labor Act Requires That the Ballot Provide for a Vote Against Representation	12
IV. Even If the Courts Below Had Jurisdiction, and Even If Respondent Had Standing To Sue, and Even If the Position of the Board and Petitioner on the Merits Is Wrong, Respondent Is Barred by Laches from the Relief Sought	14
Conclusion	15
Appendix A, District Court Opinion	1a
Appendix B, Amendment to Opinion	5a
Appendix C, Court of Appeals Opinion	6a
Dissenting Opinion	8a
Appendix D, Statute Involved	15a
Appendix E, Regulation Involved	16a

INDEX OF CITATIONS

Cases:	Page
Droggos v. National Mediation Board, 227 F. Supp. 61	10, 13
Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943)	10, 15, 16
United States v. World Airways, Inc., D.C. N.D. Calif., S.D., C.A. No. 42136	13
Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 560 (1937)	12
World Airways, Inc. v. National Mediation Board, D.C. N.D. Calif., S.D., C.A. No. 42045	13

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The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on March 12, 1964.

OPINIONS BELOW

The opinion of the District Court is reported at 218 F. Supp. 114, and is appended hereto as Appendix A. The opinion of the Court of Appeals has not yet been officially reported; it is unofficially reported at 55 LRRM 2628, and is appended hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 1963. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the District Court have jurisdiction to review the National Mediation Board's determination of the craft or class of employees of United Air Lines among whom a representation election should be held or the form of the ballot to be used in such election?

2. Does a group of employees of United Air Lines banded together in an association which expressly does not seek representation rights but seeks solely a change from the National Mediation Board in the composition of the craft or class and a change in the form of ballot, have standing to bring an action to enjoin the Board's determination of the craft or class or the form of ballot to be used in the election?

3. Does the Railway Labor Act impose on employees the duty, as well as confer the right, to bargain collectively?

4. Does the Railway Labor Act require the National Mediation Board, when it conducts an election to determine a collective bargaining representative, to use

a ballot containing a box to be marked for a vote against having a representative?

5. Is respondent barred by laches against complaining of the conduct of the National Mediation Board because it delayed for months after the Board was directed by the Act to have made a decision, before asking the Board to do anything?

STATUTES AND REGULATION INVOLVED

The relevant provisions of the Railway Labor Act (45 U.S.C. § 151 et seq.) are set forth in Appendix D. Section 1206.5 of the Rules of the National Mediation Board (29 CFR Ch. X) is set forth in Appendix E.

STATEMENT OF THE CASE

This litigation had its origin in an application filed by the petitioning Brotherhood with the National Mediation Board on August 24, 1962, requesting the Board to certify the Brotherhood as the collective bargaining representative under the Railway Labor Act of the following craft or class of employees of United Air Lines (JA* 35-36):

> "Commonly known as clerical, office, stores, (excluding stores employees represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employees represented as of August 24, 1962 by the International Association of Machinists) and passenger service employees".

The application was filed pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C.A. § 152,

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* References to "JA" are to the Joint Appendix in the Court of Appeals, of which a certified and nine additional copies are filed with this petition.

Ninth), quoted in Appendix D, p. 15a. That provision directs the Board to resolve a representation dispute within thirty days after its services are invoked.

On August 27, 1962, the Board acknowledged receipt of the application, noting that there was excluded from the normal craft the employees represented by the International Association of Machinists on the date the application was filed. JA 48. On August 30, 1962, the Board advised United and IAM of the Brotherhood application. JA 53.

On September 7, 1962, United advised the Board that in its opinion the application should be dismissed because it involved only a part of what the Board had found to constitute a craft or class in Case No. R-1706. JA 55. It requested that in the event the Board did not dismiss the application, it should hold a hearing to determine whether the proper craft or class is that expressed in prior determinations of the Board.

On September 11, 1962, IAM advised the Board that in its opinion the application did not conform to the findings of the Board in Case No. R-1706 with respect to craft or class.

Case No. R-1706, cited by both United and IAM, was a proceeding involving several airlines in which public hearings were held. In its decision on January 31, 1947, the Board, on the basis of extensive findings of fact with respect to airline operations and the duties of the several employees therein, determined that for purposes of representation under the Railway Labor Act certain employees should constitute a craft or class. These were described in detail under the captions "clerical and office employees including attend-

ants", "stores employees", "fleet service employees", and "passenger service employees".

On October 5, 1962, the Brotherhood amended its application to cover the entire craft or class described in Case No. R-1706 instead of excluding those positions theretofore represented by IAM. JA 59. The amended application was docketed by the Board on November 8, 1962 as Case No. R-3590.

The Board authorized an election after a mediator reported that his investigation showed a representation dispute to exist under the Board's rules. On December 19, 1962, the mediator requested United to furnish by January 14, 1963, a list of the employees involved in order to conduct the election. JA 37.

On January 11, 1963, United took the position that the request for the list was premature and requested a hearing on the proper scope of the craft or class involved in the Brotherhood's amended application. JA 61. On January 17, 1963, the Board denied the request for a hearing on the grounds that there was no misunderstanding or dispute concerning the scope of the class, that the carrier is not a party to a representation dispute, and that a request for a hearing at such late date was not timely. JA 70.

On January 18, 1963, United stated that it was willing to have a ballot box election on the company's premises provided the Board departed from its long-established practice and used a form of ballot that provided a space to vote for "no representative". JA 79. On January 24, 1963, the Board replied that it saw no reason to depart from its customary form of ballot in this dispute, stating that the form of ballot used by the Board had been in use since the Board's creation

and that such change would contribute to an attempt to avoid the mandate of Congress that representatives be designated. JA 80.

The form of ballot used by the Board provides a space to vote for any of the contending organizations and a blank to vote for any other organization whose name is to be written in. This form has been used for 30 years in more than 3,400 elections, in furtherance of the Board's understanding of the Congressional intent that there be representatives. JA 161-63.

On February 4, 1963, the Board's mediator asked United the status of its list of employees eligible to vote in the election and was advised it would be completed about February 11, 1963. JA 39. On that date the mediator repeated his inquiry, and United advised him and the Board that it refused to furnish the list. JA 39, 99. The Board directed the mediator to copy the necessary information from the carrier's records. JA 40.

On February 12, 1963, United commenced an action against the Board in the United States District Court for the District of Columbia, seeking to enjoin the Board from conducting an election without first holding a hearing and affording United an opportunity to appear as a party in interest on the question of the appropriate scope of the craft or class, and to enjoin the Board from using the form of ballot it had always used. The District Court granted the Board's motion to dismiss. United's appeal in that case was consolidated with the Board's and the Brotherhood's appeals in this case in the Court of Appeals, and the dismissal of its complaint was affirmed.

On February 14, 1963, the Association for the Benefit of Non-Contract Employees, respondent to this

petition, asked the Board for leave to intervene in the representation dispute; it requested also a redetermination of the craft or class and a change in the form of ballot to provide a space for an affirmative vote against representation. JA 43, 102. On February 25, 1963, it advised the Board that it did not seek recognition as collective bargaining representative, did not want its name on the ballot, and would be dissolved after it served its purpose. JA 111. The Board denied such petition. JA 14, 26, 44. A petition for reconsideration was denied April 12, 1963. JA 44, 45, 111.

The Board completed the formulation of the list of eligible voters and scheduled a mail election for April 22, 1963. JA 26, 47. On April 13, 1963, the day after the denial of its petition for reconsideration, the Association commenced an action in the United States District Court for the District of Columbia, asking for the same relief which United had asked in its action and also that the Board be required to grant the Association status as a party to the requested hearing. JA 4-9. On April 18, 1963, a temporary restraining order was issued (JA 2, 33), and on May 3, 1963 a preliminary injunction was issued enjoining the Board from conducting an election in which the form of ballot does not permit a vote to be cast against representation, ordering the Board to show cause in one week why the preliminary injunction should not be made permanent, and remanding the remainder of the relief prayed for to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act gives employees the right to have a ballot on which they can vote against representation. JA 132.

On May 10, 1963, the Mediation Board filed a motion to dismiss the complaint, or in the alternative for summary judgment. JA 159. At the same time the Board responded to the District Court's order of May 3, 1963, to show cause why the preliminary injunction should not be made permanent, opposing a permanent injunction and requesting that the preliminary injunction be vacated or stayed to permit the Mediation Board to conduct the proposed election. JA 158.

On May 8, 1963, the Brotherhood filed a petition to intervene as a defendant in the proceedings and tendered to the District Court an answer to the complaint on behalf of the Brotherhood. JA 3, 157. By order dated May 29, 1963, the District Court granted the Brotherhood's motion to intervene (JA 171) and on the same date entered its final judgment and order permanently enjoining the Mediation Board from conducting a representation election on the Brotherhood application unless the form of ballot used permits a voting employee to cast a vote against collective bargaining representation. This order also remanded to the Board for further consideration in the light of the Court's conclusions the request of the respondent Association that the Board conduct a hearing relating to the appropriateness of the craft or class of employees of United among whom the election should be held, at which hearing the Association could be heard as a party. JA 170.

On appeal to the Court of Appeals for the District of Columbia, that judgment was affirmed, Judge Wright dissenting. Appendix C.

Respondent predicated the District Court's jurisdiction on 28 U.S.C. §§ 1331 and 1337. It was and is

the position of petitioner that the District Court was without jurisdiction of the subject-matter by reason of such jurisdiction having been withheld by the Railway Labor Act.

REASONS FOR GRANTING THE WRIT

Most of the reasons for granting the writ are set forth in the dissenting opinion below of Judge Wright, in which he concluded (App. 15a):

> "This litigation is a throwback to the early days of the 1900's when federal courts were used to deliver individual workmen unrepresented to the bargaining table of their employer. * * * I thought those days were over."

The decision below, especially on the issue of its jurisdiction of the subject-matter, is in conflict with decisions of this Court and numerous decisions of other Courts of Appeals and District Courts. On the issue of the form of ballot, the decision below upsets a practice since the Board's inception, thirty years ago, which it followed in over 3,400 elections, casts doubt on the validity of innumerable certifications of collective bargaining representatives under the Railway Labor Act, and has given rise to other litigation of the same nature disrupting the functioning of the National Mediation Board in the resolution of representation disputes; it decides an important question under the Railway Labor Act which has not heretofore been considered by this Court. Such decision should not be permitted to stand without review by this Court.

I. The District Court Did Not Have Jurisdiction of the Subject-Matter

In this case the National Mediation Board took two actions which were the basis of the complaint in the District Court. First, the Mediation Board exercised its discretion to refuse the request of the respondent Association that the Board conduct a hearing for the purpose of redetermining the scope of the craft or class of employees of United Air Lines among whom a representation election should be held on the application of the Brotherhood. Second, the Mediation Board exercised its discretion to refuse the request of the Association that the Board change the form of ballot used by the Board for almost thirty years in the conduct of representation elections on railroads and airlines under the Railway Labor Act.

Following this Court's decision in *Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297 (1943), numerous decisions have followed its holding and held that the federal courts were without jurisdiction to review decisions the Board makes in resolving representation disputes. A number of them are cited in footnote 7 of Judge Wright's dissenting opinion. App. 11a. After the decision of the District Court in this case, the United States District Court for the Northern District of Ohio expressly disagreed with it and held directly opposite. *Droggos* v. *National Med. Bd.,* 227 F. Supp. 61.

Unlike the National Labor Relations Act, the Railway Labor Act contains no provision for judicial review of representation proceedings. In the *Switchmen's Union* case this Court held that such absence indicated a Congressional purpose that there be no such review. The decisions below are the first attempt

since then by the courts to direct the Mediation Board concerning the procedure it must follow in resolving representation disputes,—a procedure contrary to its uniform practice during its entire existence. Already it has stirred up a number of similar disputes and some lawsuits around the country and has made it impossible for the Board to perform its functions in this area in many cases in the manner it deems proper. The decision below should be reviewed, else the functioning of section 2, Ninth of the Railway Labor Act will continue to be frustrated in numerous cases.

II. Respondent Had No Standing to Maintain the Action

Although the respondent Association petitioned the Board (six months after the Brotherhood invoked the Board's services) for leave to intervene, to redetermine the craft or class, and to change the form of ballot the Board had always used (JA 102-5), it stated expressly that it did not want to be the bargaining agent and did not want its name on the ballot. JA 111. Under the Board's long-standing rules, intervention is permitted if there is warrant for placing the intervenor's name on the ballot. Rule 1206.5 (29 CFR Ch. X). The Board's authority under section 2, Ninth relates solely to "who are the representatives", and respondent has precluded itself from being a party to any such dispute and thus has no standing to seek judicial review of the manner in which the Board resolves that dispute.

The decision below in effect sweeps aside these long-standing rules of the Board which have, so far as we know, never before been challenged.

III. If the Merits are Reached, it is Important That This Court Settle the Question of Whether the Railway Labor Act Requires That the Ballot Provide for a Vote Against Representation

The Court below held that the Railway Labor Act requires that there shall be on the ballot the National Mediation Board uses in elections a place to vote affirmatively for having no collective bargaining representative (JA 147-56), and permanently enjoined an election in this case unless the ballot so provided. JA 170.

This Court recognized, in *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 560 (1937) that the Railway Labor Act "is dependent for its operation upon the selection of representatives." The Board has always been of the view that the Act intends employees to have representatives and has consistently, in more than 3,400 elections over a period of thirty years, used ballots to determine who is, not whether there shall be, the representative of the craft or class, although it makes no certification if less than a majority cast valid ballots. Nor has it kept this view a secret, yet Congress has not seen fit to amend the Act.

Petitioner submits that that view is the correct one, as evidenced by numerous provisions of the Act.

Section 2, Second of the Act provides that disputes shall be considered "in conference between representatives". Section 6 provides that a change in rates of pay, rules, or working conditions shall be initiated by the carriers or "representatives of employees" serving a thirty day notice, and that conferences must be had "between the representatives of the parties". Section 2, Sixth provides that in the case of a dispute over grievances "it shall be the duty of the designated rep-

resentative or representatives of such carrier or carriers and of such employees" to confer. Section 2, Fourth provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representatives", not whether there shall be representatives. Section 2, Ninth provides that in a representation dispute the Board shall make a decision (with or without an election) "as to who are the representatives", not whether there shall be representatives. Thus unlike the National Labor Relations Act (29 U.S.C. § 159(e)), the Railway Labor Act contains no provision for decertification of a collective bargaining representative without certification of another. The United States District Court for the Northern District of Ohio expressly disagreed with the decision below on the validity of the form of ballot used by the Board. *Droggos* v. *National Mediation Board,* 227 F. Supp. 61.

But regardless of whether the Court below or other courts are correct concerning the soundness of these views, it is important that this Court settle that question.

Since the decision of the District Court in this case the question of the validity of the form of ballot has been frequently raised, and on a number of occasions litigation over that issue has ensued. In two of those cases orders have been entered deferring further proceedings until the final determination of this case. *World Airways, Inc.* v. *Natl. Med. Bd., et al.,* D. C. N.D. Calif., S.D., C.A. No. 42045; *United States* v. *World Airways, Inc.,* D. C. N.D. Calif., S. D., C.A. No. 42136.

In the Twenty-ninth Annual Report of the National Mediation Board to the Congress, transmitted Novem-

ber 1, 1963, the Board referred to some of this litigation (p. 19) and reported that it had not changed the form of its ballot and believed it should not do so until the litigation was concluded. In the meantime, the issue keeps getting raised, litigation ensues, and in some cases the functions of the Board in this area cannot be performed. The issue should be settled by this Court.

IV. Even if the Courts Below had Jurisdiction, and Even if Respondent had Standing to Sue, and Even if the Position of the Board and Petitioner on the Merits is Wrong, Respondent is Barred by Laches From the Relief Sought

Section 2, Ninth of the Railway Labor Act imposes upon the National Mediation Board the duty to certify the name of the representative within thirty days after the receipt of the invocation of its services with respect to a dispute as to who is the representative. The invocation in this case was made by the Brotherhood on August 24, 1962, and its receipt by the Board was acknowledged on August 27, 1962. JA 48. It has been recognized for some time that the Board cannot always make a determination within the thirty-day period specified in the statute and that the language of Section 2, Ninth in this respect is hortatory rather than an inflexible command. But the goal is thirty days, and the performance should meet the goal or approach it to the extent feasible.

Respondent's request to be heard by the Board was not made until February 11, 1963, five and a half months after the Brotherhood's invocation and four and a half months after the Board was supposed to have made its certification. This was after the Board had denied an identical request from United (JA 86) and after the Board had decided to proceed with an

election. JA 98. It was also some three weeks after the Board had denied United's request for a redetermination of the craft or class upon the ground in part that such request was untimely. JA 71.

Under such circumstances, the request coming at such time was too late. Assuming that respondent had standing to make the request and to initiate this litigation, the respondent should not be heard by the courts to complain of conduct of the Board when it did not even approach the Board until four and a half months after the Board was supposed to have concluded its procedures and when the Board had already ruled on the issues involved. JA 70, 76, 86, 96. Yet, as a result of its request and this ensuing litigation, more than a year and a half have now passed since the Board's services were invoked and no certification has yet been made.

To permit such belated application and to entertain litigation predicated on its rejection, in the absence of a showing of the most extraordinary circumstances, would make a mockery of the statutory thirty-day requirement and of orderly procedure, and would facilitate an evasion of obligations imposed by Congress in the Railway Labor Act.

CONCLUSION

To put an end to multifarious litigation over issues that had universally been recognized as nonjusticiable from the time of this Court's decision in *Switchmen's Union* v. *National Mediation Board*, 300 U.S. 515, until the decision below in this case, and to bring to an end the innumerable administrative disputes and the frustration of the Board's functions in numerous cases under section 2, Ninth of the Railway Labor Act, cer-

tiorari should be granted to reaffirm this Court's holding in the *Switchmen's Union case*. If the Court should conclude that certiorari should not be granted for such reason, then it should be granted for any of the other reasons urged above, especially to settle the question whether the form of ballot used by the Board for thirty years in over 3,400 elections, is in violation of the Railway Labor Act.

Respectfully submitted,

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APPENDIX A

Memorandum

On May 3, 1963, this Court granted a preliminary injunction enjoining the defendant National Mediation Board from conducting any election among the "Clerical, Office, Stores, Fleet and Passenger Service employees" of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation. On the same date, this Court also ordered that the defendant have until May 10, 1963, to show why the preliminary injunction above granted should not be made permanent.

On May 10, 1963, the defendant filed a motion to dismiss the complant, or in the alternative for summary judgment. On the same date, the defendant filed a response to the order to show cause, requesting the Court to reconsider and vacate the preliminary injunction above granted, or to stay the preliminary injunction and allow the Mediation Board to conduct the proposed election, and opposing the entry of a permanent injunction.

In support of its various motions, the defendant has submitted an affidavit of Francis A. O'Neill, Jr., a member of the National Mediation Board. Mr. O'Neill has repeated the Board's position as to the long-continued use of this form of ballot, and the time and expense involved in the preparation by the Board of a new list of eligible voters. Obviously, neither of these arguments is sufficient to overcome the Court's previous conclusions, stated in its memorandum of May 3, 1963, that the proposed form of ballot is illegal under the Railway Labor Act, 45 U.S.C. § 151 *et seq*, and that plaintiffs, with the balance of convenience in their favor, would be irreparably injured by the holding of the election with an illegal form of ballot.

The only argument of Mr. O'Neill's not already made by the Board, and hence not fully considered by the Court in reaching its conclusion to issue the preliminary injunction, is the following:

> In the opinion of the National Mediation Board any requirement that the ballot used in a representation dispute be changed to provide a space in which the voters can vote for no represenation will tend to encourage the parties to a representation dispute to resort to self-help rather than to seek the services of the Board in resolving the representation dispute and will result in strikes and unrest in the industries covered by the Railway Labor Act which would not result were the normal form of ballot used.

Implicit in this argument is the assumption that unions will prefer to strike rather than to ask the National Mediation Board to investigate a representation dispute pursuant to 45 U.S.C. § 152, Ninth, if any election held by the Board in the course of such investigation must be by a ballot on which the voter can express a preference for no collective bargaining representation. Why unions would prefer to strike rather than engage in an election campaign culminating in a ballot on which all alternatives are clearly stated is not clear to the Court. The Board already has a policy of refusing to certify a collective bargaining representative if a majority of the eligible voters fail to return valid ballots. The Court has merely held that the ascertainment of the number of voters who prefer no collective bargaining representation must, under the Railway Labor Act, be by means of ballots on which such preference can be expressed clearly and unambiguously. Such an unambiguous procedure for ascertaining majority will is no more an invitation to strikes or "self-help" than is the Board's own present policy. In any event, if such "self-help" were to impair the Board's important functions, then it would be for the Congress to take such action as it demed appropriate to change the Railway Labor Act.

The Board has made the further argument that the issue of whether the Railway Labor Act's provisions for majority determination of representation disputes requires a

ballot on which a voter can express a preference against any such representation, is a matter properly left to the expertise of the Board, even though a question of statutory construction is obviously involved. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), upon which the Board relies for this argument, is not in point. There the dispute concerned which of two methods of financial cost accounting was required by a statute which specified neither, and the Supreme Court held that the Canal Company could determine the issue as it thought best, particularly since the President and the Congress had been fully advised of the Canal Company's method of accounting. 356 U.S. at 318-19. "[T]he question is so wide open and at large as to be left at this stage to agency discretion. The matter should be far less cloudy, much more clear for courts to intrude." *Id.* at 319. Here, by contrast with the *Panama Canal Co.* case, the issue of statutory construction goes to the very center of the complicated mediation procedures outlined at length in the Railway Labor Act, with its clear and uncloudy emphasis upon majority determination of the issue of representation. The form of ballot prescribed by the Board is a clear "mistake of law," and judicial review is thus appropriate. *Id.* at 318.

The Board has also cited to the Court certain language from the recent case of *WES Chapter, Flight Eng'rs' Ass'n* v. *National Mediation Bd.*, — U.S. App. D.C. —, 314 F.2d 234 (1962).[1] The language immediately following that

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[1] "The need for a large degree of conclusiveness in the settlement of labor disputes over the question of employee representation in the transportation industry was met by Congress in the Railway Labor Act. Responsibility was given to a board with special competence, in the effort to maintain enough harmony to prevent interruption of service. Congress sought to preclude litigation in the courts over what the Supreme Court has called an 'explosive problem.' *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 303 (1943). The Court said Congress had taken 'great pains' to protect the Mediation Board in its handling of the problem. Consequently the courts have seldom intruded. [Citation of cases omitted.]" 314 F.2d at 236.

quoted by the Board, however, is more relevant to the issues now before the Court:

> Where courts have taken jurisdiction of such representation disputes the context has strongly indicated either that the Board by refusing to act had obliterated rights granted to employees by Congress or, turning now to a situation arising under the National Labor Relations Act, the Board had acted in excess of its delegated powers and contrary to a statutory provision which is "clear and mandatory." *Leedom* v. *Kyne*, 358 U.S. 184 (1958). When this occurs the courts "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190. *WES Chapter, supra*, 314 F.2d at 236.

An election based upon use of the Board's present ballot would obliterate the right to vote for no collective bargaining representation, and would thus be contrary to the clear requirements of the Railway Labor Act's stated policy of majority determination.

Since the above points constitute the only issues raised by the Board in response to the Court's order to show cause why the preliminary injunction should not be made permanent, and since the Board in response to said order to show cause has raised no disputed issue of fact on which a trial would be necessary, the Court will deny the Board's motion to dismiss or in the alternative for summary judgment, and will issue a permanent injunction for the reasons set forth in this memorandum and in the memorandum of May 3, 1963.[2]

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[2] In reaching this conclusion, the positions advanced by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, which union has been permitted to intervene in this action pursuant to Rule 24(b), Fed. R. Civ. P., have been fully considered but have not been separately stated since they repeat, in summary form, issues fully argued by the Board and disposed of by the Court in its memorandum of May 3, 1963.

This memorandum shall be considered as specific findings of fact and conclusings of law, supplemental to the findings of fact, conclusions of law, and memorandum of May 3, 1963, which findings, conclusions, and memorandum of May 3, 1963 are hereby readopted by the Court.

/s/ LUTHER W. YOUNGDAHL
Judge

May 29, 1963

APPENDIX B

Order Amending District Court Opinion

Counsel for the National Mediation Board having informed the Court that the policy of the Board concerning ballots marked "No representation" or "No union" is to tabulate such ballots as void, and to treat such ballot as if the voter had refrained from returning a ballot at all, it appears to the Court that the following sentences, appearing on page 10 of the Court's memorandum filed May 3, 1963, should be deleted therefrom:

> If, instead of refraining to vote, the voter returns a ballot marked "No representation" or "No union," the ballot will be counted for purposes of participation, but will be tabulated as void; the voter would thus cast a ballot against the very position he seeks to support.

Therefore, it is by the Court this 10th day of May, 1963,

ORDERED That the above sentence be and the same is hereby deleted from said memorandum.

/s/ LUTHER W. YOUNGDAHL
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,777

UNITED AIR LINES, INC., *Appellant*

v.

NATIONAL MEDIATION BOARD, ET AL., *Appellees*

No. 18,068

NATIONAL MEDIATION BOARD, ET AL., *Appellants*

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Appellee*

No. 18,072

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Appellant*

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Appellee*

Appeals from the United States District Court for the District of Columbia

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Before WILBUR K. MILLER, BASTIAN and WRIGHT, Circuit Judges.

PER CURIAM: These three appeals have been consolidated by this court. In our view Nos. 18,068 and 18,072 should be disposed of first, although they are later in their numbering.

In No. 18,068, the National Mediation Board appeals from an order issued by the Disrtict Court which, among other things, restrains the Board from conducting a representation election.

In No. 18,072, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes appeals from the same order.

The order appealed from is as follows:

> ". . . ORDERED That the Board is hereby permanently enjoined from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation, and it is
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> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 et seq gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

The opinion of Judge Youngdahl, of the District Court, is found in 218 F.Supp. 114 (1963) and is adopted by us as the opinion of this court. It follows that the judg-

ment of the District Court in these cases must be affirmed.

In No. 17,777, United Air Lines, Inc. appeals from the dismissal by the District Court of its action filed to enjoin the election proposed by the National Mediation Board. The grounds for dismissal of the action are not stated in the court's order but, as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed. The close question as to United's standing, about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the District Court's dismissal, because our decision in the other two cases affords the relief concerning the form of the ballot which United sought.

No. 18,068 is affirmed.

No. 18,072 is affirmed.

No. 17,777 is affirmed.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part*: In No. 17,777 of this consolidated litigation, United Air Lines appeals from the District Court's refusal to enjoin the National Mediation Board from conducting a representation election under Section 2, Ninth, of the Railway Labor Act. 48 Stat. 1188, 45 U.S.C. § 152, Ninth. In Nos. 18,068 and 18,072, the National Mediation Board and the Brotherhood of Railway and Steamship Clerks appeal from the granting of an injunction against the Board, by the same court through a different judge, restraining it from conducting the same election which is the subject of the United Air Lines suit. The second injunction action was brought[1] by certain employees of

[1] The employees' action was brought after United Air Lines' application for an injunction was denied.

United Air Lines who claim to want to represent themselves *individually* in their labor negotiations with their employer. I agree with the court that in No. 17,777 the United Air Lines injunction proceeding was properly dismissed by the District Court. I respectfully dissent from its affirmance in Nos. 18,068 and 18,072 upholding the issuance of the injunction against the National Mediation Board.

Since the United Air Lines suit and the action brought by some of its employees appear to have a common inspiration as well as common issues, I shall treat them together. Both United and its appellee employees, here called ABNE,[2] urge two grounds for enjoining the Board from performing its duty under the Act: (1) The Board improperly determined the bargaining unit craft or class to be "clerical, office, stores, fleet and passenger service employees"; and (2) the Board proposes to use in the election a form of ballot which does not provide a space for the employee to vote against representation.

The craft or class recognized by the Board as the proper bargaining unit for the proposed election is the same as that recognized in its 1947 proceeding. Case No. R-1706, Determinations of Craft or Class of the National Mediation Board (1947). There has been no change in the classification since that time. After considering the representations by United as to the need for change, the Board determined that it would follow its prior ruling. Thus United and ABNE would have the court reweigh these class considerations and substitute its judgment for the Board's

With reference to the form of ballot, space is provided to vote for either of the competing unions.[3] A third blank

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[2] Association for the Benefit of Non-Contract Employees.

[3] The two competing unions shown on the ballot were the Brotherhood of Railway and Steamship Clerks and the International Association of Machinists.

space is indicated for voting for a representative not named on the ballot. That same blank space may be used for voting for "no union" or "no representation." Section 2, Fourth,[4] of the Railway Labor Act provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Thus, if a majority of the craft or class actually votes for representation, a representative may be selected. If a majority fails to vote, the Board may not certify a representative. *Radio Officers' Union* v. *National Mediation Board*, 86 U.S.App.D.C. 319, 181 F.2d 801 (1950). In addition, the admitted practice of the Board is to add the number voting "no union" to the number not voting in determining whether a majority of the employees eligible to vote actually voted for representation.

The District Court's action enjoining the Board from conducting the election here is in the teeth of a host of cases from the Supreme Court, from this court, and from the Circuit Courts around the country. In the interest of economy, I shall simply list *seriatim* the reasons why this injunction should not have been issued and briefly comment on each.

1. The District Court was without jurisdiction to enjoin the National Mediation Board from conducting an election to resolve the representation dispute at United Air Lines. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943). In upholding the action of the Board against union attack, the Court in *Switchmen's Union* said, "* * * if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say *on any aspect* of the problem, it would have made its desire plain." 320 U.S. at 303. (Emphasis added.) Unlike the National Labor

[4] 48 Stat. 1187, 45 U.S.C. § 152, Fourth.

Relations Act,[5] the Railway Labor Act has no provision for judicial review. *Switchmen's Union* was reinforced by three other cases[6] handed down by the Supreme Court at the same term, and the force of these decisions has continued, unmodified by Congress, down to the present day.[7]

2. The ballot which the District Court has ordered changed before an election can be conducted has been used by the Board and its predecessor, the Railway Labor Board, since 1921 in over 3,400 elections. In the 43 years since 1921, Congress has not indicated the slightest disapproval of the Board's election machinery—including its ballot. Moreover, no court, except the District Court

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[5] 49 Stat. 453, 29 U.S.C. § 159(d).

[6] *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323 (1943); *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U.S. 338 (1943); and *Brotherhood of Railway & Steamship Clerks, etc.* v. *United Transport Service Employees*, 320 U.S. 715 (1943) (*per curiam*).

[7] *Order of Railway Conductors* v. *National Mediation Bd.*, 79 U.S. App. D.C. 1, 141 F. 2d 366, *cert. dismissed*, 323 U.S. 166 (1944); *Radio Officers' Union* v. *National Mediation Board, supra; Rutas Aereas Nacionales, S.A.* v. *Edwards*, 100 U.S. App. D.C. 366, 244 F. 2d 784 (1957); *Decker* v. *Venezolana*, 103 U.S. App. D.C. 301, 258 F. 2d 153 (1958); *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board*, 111 U.S. App. D.C. 126, 294 F. 2d 910 (1961), *cert. denied*, 369 U.S. 810 (1962); *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd.*, 111 U.S. App. D.C. 121, 294 F. 2d 905 (1961), *cert. denied*, 368 U.S. 956 (1962); *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd.*, 114 U.S. App. D.C. 229, 314 F. 2d 234 (1962). Among decisions from other courts are *Brotherhood of Ry. & S. Clerks. etc.* v. *Virginian Ry. Co.*, 4 Cir., 125 F. 2d 853 (1942); *Rose* v. *Brotherhood of Railway and Steamships Clks.*, 4 Cir., 181 F. 2d 944, *cert. denied*, 340 U.S. 851 (1950); *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 2 Cir., 311 F. 2d 745, *cert. denied*, 373 U.S. 924 (1963); *Ruby* v. *American Airlines, Inc.*, 2 Cir., 323 F. 2d 248 (1963), *cert. denied*, February 17, 1964.

here, in the ABNE case but *not* in the United case, has found this ballot unlawful.[8] And this court has approved its use as a proper exercise of the Board's discretion within the intendment of the Act. *Decker* v. *Venezolana, supra* Note 7 (see briefs).[9]

3. The Board's craft or class determination is unreviewable. This court has so held in at least four cases, one at the last term of court. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note 7; *Radio Officers' Union* v. *National Mediation Board, supra.* The Fourth Circuit, in *Rose* v. *Brotherhood of Railway and Steamship Clks., supra* Note 7, 181 F.2d at 946, summed it up well:

> "In the light of the decisions of the Supreme Court, there can be no doubt that the effect of this statute

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[8] But *cf. McNulty* v. *National Mediation Board,* N.D.N.Y., 18 F. Supp. 494 (1936).

[9] The *Decker* case involved the jurisdiction of the District Court to review the action of the Mediation Board. Paragraph 8 of the amended complaint there raised the same issue which is raised here:

> "[Due process was denied] in that the ballot used in the election had no space on it for a vote to the effect that the employee did not want anyone, defendant I.A.M. or anyone else, to represent him."

That issue was preserved on appeal, in paragraph 1b of the Questions Presented:

> "* * * the right to [due process] was denied by use of a ballot which gave no way to vote against representation by any bargaining agent."

Affirming the dismissal of the complaint, this court stated, "We hold that the prohibition of the Switchmen's case applies in the circumstances of this case." 103 U.S. App. D.C. at 302, 258 F. 2d at 154.

was to vest in the Mediation Board exclusive jurisdiction over the *certification of bargaining agents, the determination of bargaining units and the classification of employees for the purposes of bargaining.* And it is equally clear that the *exercise of discretion by the board with respect to such matters is not subject to review by the courts.* * * *" (Emphasis added.)

4. United Air Lines lacks standing to challenge the Board's action. The purpose of the Railway Labor Act is to guarantee employees complete freedom to organize—freedom from employer interference. This Act was passed, as the Government asserts, "to put an end to the harmful consequences of * * * individual dealing between large carriers and small employees. *Machinists* v. *Street*, 367 U.S. 740, 760; *Virginian Ry.* v. *Federation*, 300 U.S. 515, 553; *Texas & N.O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 570." United's obligation under the Act is *not "to interfere in any way with the organization of its employees."* Railway Labor Act, § 2, Fourth. (Emphasis added.) And this obligation includes refraining from filing, or inspiring, litigation designed to block or delay representation elections conducted by the National Mediation Board.

5. There is no *Leedom* v. *Kyne*, 358 U.S. 184 (1958), question here. It is not even suggested that the Board has acted contrary to a plainly and expressly defined statutory duty, nor has the Board here conceded that it has so acted, as in *Leedom*. This principle has been expounded recently by this court in a series of cases so there should be no doubt about its application. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra*

Note 7. In the *UNA* case we said (111 U.S.App.D.C. at 124, 294 F.2d at 908):

> "Appellant urges, however, that jurisdiction exists under the Supreme Court's decision in Leedom v. Kyne, 1958, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210. We cannot agree. In Leedom the Supreme Court carefully differentiated Switchmen's Union from the case before it, pointing out that the latter did not involve 'review' of agency action, but the striking down of action *in excess of delegated powers, in flat violation of the controlling statute*—there the Labor Management Relations Act, 29 U.S.C.A. § 141 et seq. See 358 U.S. at pages 188-190, 79 S.Ct. at pages 183-184. It should be noted, also, that in Leedom v. Kyne the National Labor Relations Board *did not deny* that it had contravened its governing statute. See 358 U.S. at page 187, 79 S.Ct. at page 183. No such admission is made here, and appellant has not pointed out any clear statutory limitation expressed by the Railway Labor Act which has been violated by the NMB. • • •" (Emphasis added.)

6. There is a demonstrable lack of equity in the application for the injunction against holding the election. ABNE, the no-contract employees' group, claims it represents more than half of the employees eligible to vote in the election. If so, its remedy is to tell its members either not to vote or to vote for no representation. As shown, if its membership complies with these instructions, there will not be a majority voting for representation and, consequently, no representative will be certified. As indicated during oral argument, this was precisely the result of the voting—or not voting—in the representation election held recently at Lake Central Airlines. No irreparable injury is shown, therefore, if the election here is conducted as ordered by the Board.

This litigation is a throwback to the early days of the 1900's when federal courts were used to deliver individual workmen unrepresented to the bargaining table of their employer. See, *e.g.*, *Adair* v. *United States*, 208 U.S. 161 (1908); *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923). I thought those days were over.

I regret my inability to agree with my distinguished brethren in respect to this litigation. Respectfully I dissent from the court's ruling upholding this injunction.

APPENDIX D

Railway Labor Act (29 U.S.C. §§ 151 et seq.). § 2. Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and estab-

lish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

APPENDIX E

Section 1206.5 of Rules of National Mediation Board:

"*Necessary evidence of intervenor's interest in a representation dispute.* In any representation dispute under the provisions of section 2, Ninth, of the Railway Labor Act, an intervening individual or organization must produce proved authorizations from at least thirty-five (35) percent of the craft or class of employees involved to warrant placing the name of the intervenor on the ballot."